No. 13880

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARIE BALLENTINE, as Guardian of the Estate of STEPHEN WILLIAM BALLENTINE,

Appellant,

vs.

MARIE DESYLVA,

Appellee.

MARIE DESYLVA,

Appellant,

vs.

MARIE BALLENTINE, as Guardian of the Estate of STEPHEN WILLIAM BALLENTINE,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

CROSS-APPELLANT'S REPLY BRIEF.

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CROSS-APPELLANT'S REPLY BRIEF.

In reply to the brief of cross-appellee, attention is directed to paragraph 3 on page 3 thereof as to the alleged undisputed facts in the case.

It is submitted that the stipulations of facts [Tr. pp. 20-21] in the case go no further than to show that Stephen William Ballentine, a minor, was the son of

Marie Ballentine and George G. DeSylva, deceased, and that the decedent and Marie Ballentine were at no time husband and wife. In a statement of undisputed facts filed by the attorneys for plaintiff and cross-appellee [Tr. pp. 21-24], it is alleged that George G. DeSylva, deceased, acknowledged in writing that the cross-appellee was his son and that this was a sufficient acknowledgment to be within the provisions of Section 255 of the California Probate Code.

The first motion for summary judgment was filed on behalf of the cross-appellee on March 6, 1953 [Tr. p. 15] and the motion for summary judgment of the defendant and cross-appellant was filed on March 17, 1953 [Tr. pp. 24-27]. The cause was heard and arguments made thereon on the 10th and 14th day of April, 1953 [Tr. p. 29], and the case was submitted by cross-appellee upon the theory that an acknowledgment of the child within the provisions of Section 255 of the California Probate Code was sufficient to make Stephen William Ballentine a child of George G. DeSylva, deceased, within the provisions of Section 24, Title 17, United States Code.

Apparently, as an after-thought and possibly because of the belief that there was not a sufficient legitimation of Stephen William Ballentine to bring him within the term "children" as used in Section 24, Title 17, United States Code, Leon E. Kent, one of the attorneys for cross-appellee, filed on April 20, 1953, an affidavit in opposition to defendant's motion for summary judgment [Tr. pp. 27-29] in which, Mr. Kent alleges upon information and belief that the child had been legitimated within the meaning of Section 230 of the Civil Code of the State of California, and alleges further that such fact could be

established by his (affiant's) testimony to the fact that decedent had publicly acknowledged the child as his own and received him into his family and otherwise treated him as if he were a legitimate child.

This court's attention is expressly directed to that portion of Section 230 of the Civil Code of the State of California which requires that in addition to the other conditions therein stated, in order for a child to be legitimated under such section, such must be done *"with the consent of his wife."* (Emphasis ours.)

In view of the above facts, as disclosed by the record, it is respectfully submitted that paragraphs 3 and 5 on pages 3 and 4 of cross-appellee's brief are foreign to this appeal and should be disregarded.

Argument.

Space does not permit answering in detail each of the arguments made by counsel for cross-appellee. However, we shall endeavor to answer these arguments generally in the order in which they are made.

With reference to the first argument, counsel agrees that the meaning of a word may and often does change with the passage of time. However, it is respectfully submitted that in the determination of this case the court must interpret the meaning of the term "children" according to its legally accepted meaning in 1831, 1891 and 1909, and not the meaning of the word at it may be today, because from the history of Section 24, Title 17, United States Code, it appears that the right of renewal, which was given to the widow, or children, was first found in the Act of February 3, 1831. In general this same phrase, "widow or children" has survived and is

found in the amendment to the section of March 3, 1891, and the present section as passed on March 4, 1909. Most assuredly, counsel for cross-appellee will not contend that some 122 years ago Congress could foresee that the passage of time would have a tendency to broaden the term "child" or "children" and therefore it intended the term "children" to include illegitimate children in spite of the fact that it did not specifically so state and that the courts of that time, both in Great Britain and the United States, did not give such a meaning to the word.

Cross-appellee's next argument is addressed to the question that the harsh early common law rule has been relaxed by statute in various and sundry states. That this is true is not denied, but, however true that may be, it is submitted that it has no materiality upon the question as to whether or not Congress intended the word "children" to include illegitimate children as used in Section 24, Title 17, United States Code, in 1831, 1891 and 1909.

Counsel's next argument is in effect that under the laws of California the word "child" or "children" includes all children, legitimate or illegitimate, upon whom the law has conferred the capacity to inherit. This argument and the authorities cited in support thereof are inconsistent with the following argument as found on page 20 of the brief, in which counsel states:

> "Sec. 24 of Tit. 17, U. S. Code, is not a statute of inheritance but creates a new right."

That the statement of law just quoted is correct can hardly be disputed in view of the decisions of the federal courts in the following cases:

Silverman v. Sunrise Pictures Corp. (2d Cir., 1921), 273 Fed. 909, 911;

Fox Film Corp. v. Knowles (1921), 274 Fed. 731, 732;

Shapiro, Bernstein & Co., Inc. v. Bryan (2d Cir., 1941), 123 F. 2d 697, 700;

G. Ricordi & Co. v. Paramount Pictures (2d Cir., 1951), 189 F. 2d 469, 471.

Counsel for cross-appellee apparently places great weight upon the case of *Middleton v. Luckenbach S. S. Co.* (2d Cir., 1934), 70 F. 2d 326, on the theory that inasmuch as the mother of an illegitimate child and the illegitimate daughter of a mother were permitted to recover damages under the provisions of Sections 761 and 764, Title 46, United States Code, which provides in substance that the personal representative may maintain a suit for damages for the benefit of the decedent's wife, husband, parent, child or dependent relative. Therefore, the term "child" as used in this Act of Congress included illegitimate children.

Counsel, however, conveniently overlooks the language of Judge Manton at page 328, as follows:

> "Provision is made therein for the recovery by a parent, child, or dependent relative, and we must answer as to whether these words include parents of illegitimate children and illegitimate children.

> Taken in their ordinary meaning, as distinguished from their legal meaning, they are parent, child, and dependent relative. *The word 'child' is defined in legal dictionaries as meaning a 'legitimate child.'* Bouvier's Law Dictionary, vol. 1, p. 479." (Emphasis ours.)

In the *Middleton* case, it was clearly held that there was no right of inheritance involved, therefore, the court must look to the federal statute and not to local state law in order to determine who may recover. The court concludes that in view of the numerous legislative enactments and decisions permitting illegitimates to inherit and recover as the next of kin to the mother, necessarily Congress must have intended to confer upon illegitimate children the right to recover as a dependent relative under the provisions of Sections 741 and 746, Title 46, United States Code.

This same decision has been cited to the effect that the term "child" or "children" when used alone in a legislative act refers only to a legitimate child.

In addition, the facts in the *Middleton* case are clearly distinguishable from the facts of this case, because here we are dealing with the illegitimate child of a deceased father and there it was the illegitimate child of a deceased mother, and the court will take judicial notice of the fact that the relationship between the father and the illegitimate child, with reference to inheritance and otherwise, is entirely different from that of a mother and her illegitimate child.

While there is no case directly deciding the question as to whether or not the term "children" as used in Section 24, Title 17, United States Code, includes illegitimate children, there is a very enlightening case decided by the

Ninth Circuit in 1928, being the case of *Louie Wah You v. Nagle,* 27 F. 2d 573, in which it was determined that the term "children" as used in Section 6, Title 8, United States Code, did not include an illegitimate child unless such child had been legitimated in accordance with the provisions of Section 230 of the California Civil Code. There, the child who was seeking admission to the United States was admittedly the son of an American citizen who had been married to applicant's mother while he resided in China. The court held, however, that this marriage was invalid inasmuch as applicant's father had been previously married and was a resident of California and had never brought applicant to the United States, received him into his family with the consent of his first wife, and therefore applicant was an illegitimate child and was not included within the term "children" as used in Section 6, Title 8, United States Code.

Attention is directed to the fact that Section 6, Title 8, United States Code, was passed in 1802, amended in 1855, and again in 1907. It is respectfully submitted that inasmuch as this Circuit has defined the term "children," being the identical word used in Section 24, Title 17, United States Code, its definition of the word "children" is binding upon the court in the case at issue.

In further support of the decision of the Ninth Circuit in the construction of the term "children" as including only legitimate children, see:

In re Dragoni (Wyo. 1939), 79 P. 2d 465.

in which case the court, at page 469, used the following language:

> "* * * The cases, texts and law dictionaries are practically unanimous in declaring that *prima facie*

> the word 'children' in a statute means legitimate children. The rule is applied even in private writings. It was in a will case (Wilkinson v. Adam, 1 Ves. & Bea. 422, 462, 35 Eng. Rep. 179) that Lord Eldon used this emphatic language: 'The rule cannot be stated too broadly that the description, "child, son, issue," every word of that species, must be taken *prima facie* to mean legitimate child, son or issue.' * * *"

The next argument presented by cross-appellee is to the effect that the law of the state of residence of the decedent and not the common law governs the definition of the term "children" as used in Section 24, Title 17, United States Code. In support of this contention, counsel cite the case of *Seaboard Airline Ry. v. Kenney,* 240 U. S. 491, 36 Sup. Ct. 458, 60 L. Ed. 762. That case, however, was distinguished in the *Middleton v. Luckenbach S. S. Co.* case, 70 F. 2d 326, at pages 328-329, in which the court clearly held that they could not look to the state laws to determine what Congress meant when it used the term "child" or "next of kin" with reference to an interpretation of Section 761, Title 46, United States Code. It is respectfully submitted that the reasoning of the *Middleton* case is not only very persuasive, but certainly it was not intended by Congress that in one state an illegitimate child should have the right to renew the copyright and that in another state he could not.

It is respectfully submitted that throughout the argument presented to this court by cross-appellee with respect to the status of the ward as a child, cross-appellee has failed to distinguish between the import of Sections 255 and 230 of the Civil Code of the State of California. It is clear that we are not here concerned with a question of

inheritance. Therefore, legitimation under the provisions of Section 255 of the Probate Code of California is of no importance and utterly foreign to the issue.

Thus, it was incumbent upon cross-appellee to establish that the child had been legitimated under the provisions of Section 230, which it is clear has not been done even though we give full credence and import to the extraneous affidavit of Leon Kent, because as we have pointed out, it has not even been so much as suggested that cross-appellant, *the wife of the father of the illegitimate child,* ever gave her consent to its legitimation.

Conclusion.

It is respectfully submitted that the term "children" as used in Section 24, Title 17, United States Code, applies only to legitimate children, that such was the use of the term at the time of the enactment of said section by Congress and that in view of the legal definitions of the term and its uses at that time, this court must find that the cross-appellee was not a child of the deceased within the provisions of said section.

It is therefore submitted that the judgment of the trial court should be reversed in so far as it held that Stephen William Ballentine is a child of George G. DeSylva, deceased, within the provisions of Section 24, Title 17, United States Code.

Respectfully submitted,

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